2012 WL 1175795 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

Louis AMALFITANO, Appellant (Defendant Below),
v.
STATE OF INDIANA, Appellee (Plaintiff Below).

No. 48A04-1108-CR-00446.
February 28, 2012.

Appeal from the Madison County Circuit Court I
48C01-1006-FB-000199
The Honorable Rudolph R. Pyle, III, Judge

Brief of Appellee

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I. Whether the trial court **abused** its discretion by admitting a letter into evidence, when Defendant had the opportunity to cross-examine the witness at trial and the letter was not testimonial in nature.

II. Whether the trial court **abused** its discretion in finding facts relevant to sentencing.

III. Whether Defendant's sentence is inappropriate given the nature of his offenses and character.

STATEMENT OF THE CASE

Nature of the Case

Louis Amalfitano ("Defendant") appeals from his convictions and sentences for class B felony criminal confinement; class C felony battery resulting in serious bodily injury; class D felony exploitation of an endangered adult; class D felony **financial** exploitation of an ***2** endangered adult; two counts of theft; class C felony obtaining a controlled substance by fraud; and class D felony possession of a controlled substance.

Course of Proceedings

On June 3, 2010, the State charged Defendant with the following nine counts: Count I, class B felony criminal confinement; [1] Count II, class C felony battery resulting in serious bodily injury; [2] Count III, class D felony exploitation of an endangered adult; [3] Count IV, class D felony **financial** exploitation of an endangered adult; [4] Count V, class D felony theft; [5] Count VI, class D felony theft; Count VII, class D felony obtaining a controlled substance by fraud; [6] Count VIII, class D felony possession of a controlled substance; [7] and, Count IX, class D felony possession of a controlled substance (App. 29-35). On June 28, 2011, a jury convicted Defendant on all counts except Count IX (App. 10, 12). On August 1, 2011, the trial court imposed the following sentence: Count I, twenty years executed; Count II, eight years executed; Count III, three years executed; Count IV, three years executed; Count V, three years executed; Count VI, three years executed; Count VII, three years executed; and, Count VIII, three years executed (App. 12; ***3** Tr. 646). The trial court ordered consecutive sentences, for a total executed sentence of forty-six years (App. 12; Tr. 646).

Defendant filed a notice of appeal on August 31, 2011 (App. 204). The notice of completion of clerk's record was filed on September 28, 2011, and the notice of completion of the transcript was filed on December 27, 2011 (Docket). Appellant's Brief was filed and served on the State by mail on January 26, 2011 (Docket; Appellant's Brief, certificate of service).

STATEMENT OF FACTS

Sixty-five year old A.T. met the Amalfitano family in 2009, when she lived in a nearby house (Tr. 155, 157, 158, 163). Sometime in late June or early July of 2009, A.T. went to live with Luigi Amalfitano ("Amalfitano") and his three sons, V.A., E.A., and Defendant, Defendant's girlfriend Stephanie Cole, and Defendant and Cole's baby, S.A., in Madison County (Tr. 163, 165, 166). During this time, A.T. received approximately $1100 in monthly social security benefits (Tr. 164). In November of 2009, A.T. used her social security benefits to **finance** a family trip to New York City (Tr. 166, 167, 168). A.T. and the Amalfitano family drove to New York and remained there until January 2010, when they returned to Anderson (Tr. 168, 170).

After A.T. and the Amalfitano family returned to Anderson, they lived in different places, first staying with Cole's grandmother and then settling into a one-bedroom duplex at 21st Street and George (Tr. 171, 172, 349). While all six family members and A.T. lived in the duplex, Defendant began taking A.T.'s monthly social security benefits (Tr. 172, 173). A.T. "didn't have a choice," and, after cashing her monthly check, "[t]he defendant got it" (Tr. 172, 173). Defendant told A.T that her family hated her and never wanted to see her again, and that he needed A.T.'s money to pay her "criminal expenses" (Tr. 172, 173, 349). Defendant began ***4** physically **abusing** A.T. and threw a butter knife at A.T. that "split [her] head open" (Tr. 178, 179-80, 352-53). Defendant hit A.T. in the face so often that "[i]t was just an everyday occurrence" and told A.T. that she could not have food from the refrigerator (Tr. 180-81). Soon, A.T. was eating only once a day, mostly leftovers from snacks that sixteen-year old V.A. prepared for himself after school (Tr. 182-83).

While the family lived in the duplex, Defendant and Cole became friends with Barbara Shannon and her fiance, Carlos Hood (Tr. 300, 302). Shannon noticed that Defendant had "stacks of hundreds" and "[a]lot of prescription medication," including Xanax (Tr. 308). During her visits, Shannon heard Defendant refuse A.T.'s requests for food and drink, and witnessed Defendant grab A.T.'s wrist and force her to the ground (Tr. 303, 306). When A.T. tried to talk with Shannon or Hood, Defendant told A.T. to "get her ass back in the corner" (Tr. 303). Hood also saw Defendant "smack [A.T.]" and heard Defendant "cuss [A.T.] out, tell her that she can't eat, drink, smoke cigarettes, [to] get back in the corner where you belong, don't talk to nobody" (Tr. 318). Shannon became concerned about A.T.'s welfare when A.T. asked Shannon to take her out of the house (Tr. 305). Shannon asked Defendant if she could take A.T. to her apartment and Defendant replied that A.T. was not leaving "the fucking house" (Tr. 306). About a week later, the Amalfitano family and A.T. moved to a house that Defendant rented on Fletcher Street (Tr. 308-09, 463).

The house on Fletcher Street had a small laundry room with a boarded window and door, a water heater and an overhead light (Tr. 185; State's Ex. 16; State's Ex. 17). The room had two doors; the door that led to the outside of the house was secured with a padlock, and the door that led to the kitchen was secured with a latch on the outside of the door (Tr. 43, 45, 48, 49, 68; State's Ex. 3; State's Ex. 4; State's 14). The curtains that covered the door's window had been ***5** fastened to the door (State's Ex. 15). Defendant locked A.T. in that room, where she remained confined for up to ten hours at a time (Tr. 185, 189, 360, 361). A.T. could not reach the overhead light, so the room remained dark, and she slept on the floor for the first several weeks until Cole's grandmother provided her with an old, urine-stained mattress that had been kept in a barn (Tr. 185, 188, 529, 530). The inside of the door had no handle, and Defendant kept it locked from the outside (Tr. 185, 189, 190). A.T. urinated and defecated into a plastic grocery store bag (Tr. 186). The room had a horrid stench and A.T. later recalled that the "[o]nly way that I could get any fresh air was to go over to the outside back door and lay down and there was a crack about that big under the door and I'd lay there for hours breathing the air and I wanted to see the outside so bad. I'd look up and I'd cock my head a certain way and I could look underneath the curtains and I could see the sky. That's the only way I could see but I wanted to see it so bad" (Tr. 190).

Defendant continued **abusing** A.T., and "the beatings became worse" (Tr. 184). Defendant struck A.T. in the eye, grabbed her by the arm and threw her into walls several times, resulting in multiple contusions and abrasions to A.T's face and extremities (Tr. 197, 198; State's Ex. 19; State's Ex. 23; State's Ex. 24; State's Ex. 26; State's Ex. 28). Defendant also threw water on A.T. and her mattress, which forced A.T. to sleep on a wet mattress or curl up in a corner of the room if she could find a dry spot on the carpet (Tr. 187). At times, Defendant instructed his younger brother E.A. to throw water on A.T. (Tr. 352). No one in the house fed A.T. except V.A., and, when he was not home, she did not eat (Tr. 363). While the family lived in this house, Defendant continued to appropriate A.T.'s monthly social security benefits, took her prescription drugs, and acquired A.T.'s prescriptions for Xanax and hydrocodone from a nearby pharmacy (Tr. 198-99, 199-200, 252, 332, 357).

***6** Shannon and Hood became concerned after A.T. moved with the Amalfitano family to Fletcher Street, because when they visited, they "couldn't see [A.T.] at all. Every time we went over there, she was nowhere around, she was always gone or upstairs" (Tr. 321). When Defendant told Shannon that A.T. was upstairs, Shannon "did not buy it" because she "knew [A.T.] could hardly walk" (Tr. 312). After Shannon noticed a locked door off the kitchen, she contacted Adult Protective Services because "it just seemed weird" (Tr. 311, 313).

On May 27, 2010, Officer Freddie Tevis, a police officer with the city of Anderson, responded to the dispatch and went to the Amalfitano residence to perform a welfare check on A.T. (Tr. 34, 35-36). Tevis met Amalfitano at the residence and told Amalfitano that he needed to perform a welfare check on A.T. (Tr. 38). Amalfitano initially denied that A.T. lived in the house, but then told Tevis that A.T. had gone to the grocery store and that A.T. had the beginnings of dementia (Tr. 76). When Tevis inquired whether A.T. should be walking to the store in her condition, Amalfitano gave permission for Tevis to enter the residence (Tr. 38, 76, 77). Amalfitano led Tevis through the house and, when they returned downstairs, Tevis noticed a small room secured by a latch off the kitchen (Tr. 41; State's Ex. 3; State's Ex. 4). When Tevis asked Amalifitano what was inside the room, Amalfitano unlocked the door and Tevis saw A.T. sitting inside the darkened room on a mattress (Tr. 41, 42, 47).

When A.T. emerged from the room, she appeared very thin, fragile and disoriented (Tr. 43). She had a blackened and bruised eye, and multiple abrasions, cuts and bruises on her arms and face (Tr. 42, 43; State's Ex. 19; State's Ex. 20, State's Ex. 21; State's Ex. 22; State's Ex. 23; State's Ex. 24). Both doors to the room were locked; the door leading to the outside of the house was padlocked, and the door leading to the inside of the house had been locked from the outside with a latch (Tr. 45, 48, 49, 68; State's Ex. 3; State's Ex. 4; State's Ex. 14). The only furniture in ***7** the room was a mattress (Tr. 42). Tevis noticed a plastic bag containing urine and feces hanging from the inside of the doorknob, and observed that the room had no ventilation and was extremely hot, "almost like a sauna" (Tr. 42, 49; State's Ex. 8). The excrement contained within the plastic bag leaked onto the carpet (Tr. 89; State's Ex. 10).

Officer Ian Spearman, a city police officer who accompanied Tevis, subsequently took Defendant into custody when he and Cole returned to the residence (Tr. 94, 96). After Officer Spearman performed a search of Defendant, he recovered a prescription bottle belonging to A.T. in Defendant's pants pocket (Tr. 98, 99, 101). The forensic scientist later concluded that the medication contained Alprazolam, a controlled substance with the brand-name Xanax (Tr. 423, 431, 432; State's Ex. 47). Following execution of a search warrant at the Amalfitano residence, officers recovered a letter from the Social Security Administration to A.T. describing overpayment of her benefits on a shelf in the closet of Defendant's downstairs bedroom (Tr. 409, 410, 411, 416). Officers also recovered a letter and an anniversary card written by Cole to Defendant in the same downstairs bedroom closet (Tr. 414, 416; State's Ex. 33; State's Ex. 36; State's Ex. 37). In addition, officers found the prescription medication Xanax and an empty prescription bottle for Lortab, both belonging to A.T., in Defendant's bedroom (Tr. 415, 416).

A.T. received treatment for her injuries from Dr. Parker at a local hospital (Tr. 255). Dr. Parker diagnosed A.T. with numerous medical conditions, including hypokalemia -- extremely low levels of potassium - which posed an immediate risk of sudden cardiac death from abnormal heart rhythm (Tr. 262-62). Dr. Parker also diagnosed A.T. with delirium, dehydration, malnutrition and noted that she exhibited several signs of **elder abuse**, including significant bruising to her right eye, and facial deformities and bruising (Tr. 264, 265, 270). CT scans of A.T.'s facial bones revealed fractures below the eye and to the sidewall of the eye, normally ***8** caused by blunt force trauma (Tr. 270, 271). Dr. Parker also noted significant bruising to A.T.'s body on all

extremities, bruising to her scalp, and multiple, bilateral rib fractures to A.T.'s left 4th, 5th, and 6th ribs, and to her right 7th, 8th, and 9th ribs (Tr. 272, 272, 276). Dr. Parker noted that A.T.'s rib fractures were in various stages of healing but the bruising to her eye was recent (Tr. 271, 273). Dr. Parker also observed that A.T. had sustained a "severe weight loss" of thirty-six pounds since her last visit to the hospital eight months earlier and described her overall physical condition as "extremely poor" (Tr. 266, 269).

The State charged Defendant with nine felony counts and a jury convicted him on eight charges (Tr. 602-03). At trial, Defendant's brother V.A. testified against him and told the jury that Defendant was "the boss of the house" and "whatever he says goes" (Tr. 366). According to V.A., he knew Defendant bore responsibility for injuring A.T., but felt powerless to help A.T. (Tr. 365). At sentencing, A.T. testified that although multiple individuals within the Amalfitano family were charged with crimes against her, Defendant was the most culpable of everyone and that she identified Defendant as the person most responsible for victimizing her (Tr. 612). Following Defendant's sentencing hearing, the trial court sentenced Defendant to an aggregate executed term of forty-six years for his crimes (Tr. 646). Defendant now appeals.

SUMMARY OF ARGUMENT

1. The trial court did not **abuse** its discretion when it admitted Cole's letter into evidence because the letter is not testimonial evidence and Defendant had the opportunity to cross-examine Cole at trial. Cole's letter is informal and not written with the intent that it would be used in a criminal prosecution; therefore, the letter is not testimonial. Further, Defendant had the opportunity to cross-examine Cole at trial, but refused to cross-examine her at trial. Finally, ***9** because substantial evidence exists that supports Defendant's guilt, any error by admission of the letter was harmless. This Court should affirm the trial court's judgment.

II. The trial court did not **abuse** its discretion in finding facts relevant to sentencing. The trial court committed no error when it imposed a longer sentence for Defendant's crimes than for his father's crimes. Unlike Defendant, Amalfitano pled guilty and received some benefit by way of a plea agreement Further, while Defendant contends that his crimes were "nearly identical," the evidence revealed that Defendant instigated the crimes against A.T., and that other family members operated under his control and direction. The trial court also did not improperly rely upon Defendant's juvenile history as an aggravating factor. Defendant's juvenile history reveals several arrests and at least three adjudications for battery, resisting law enforcement and fraud, which bear directly on his present convictions for violent and fraudulent offenses. This Court should affirm the trial court's judgment.

III. Defendant has failed to meet his burden of establishing that both the nature of his offenses and his character justify a lesser sentence. Defendant has waived this issue by failing to argue that the nature of his offenses warrants a downward revision in his sentence. Waiver aside, Defendant's sentence is not inappropriate, especially in light of his culpability, the severity of his crimes, and his lack of remorse. This Court should affirm the trial court's judgment.

ARGUMENT

I. The trial court did not abuse its discretion when it admitted Cole's letter into evidence

The trial court did not **abuse** its discretion when it admitted Cole's letter into evidence because the letter is not testimonial evidence and Defendant had the opportunity to cross-examine Cole at trial. A trial court has broad discretion in ruling on the admissibility of evidence ***10** and we will disturb its rulings only where it is shown that the court **abused** that discretion. *Turner v. State*, 953 N.E.2d 1039, 1045 (Ind. 2011) (citing *Griffith v. State*, 788 N.E.2d 835, 839 (Ind.2003)). An **abuse** of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* (citing *Jackson v. State*, 697 N.E.2d 53, 54 (Ind. 1998).

During trial in a hearing outside the presence of the jury, the court found that Defendant violated its separation of witnesses by contacting witness Stephanie Cole, who was also charged with crimes against A.T., before trial and talking with her about her testimony (Tr. 294-95; App. 29-35). Later, during Cole's testimony, the trial court admitted into evidence a letter written by Cole that provided an eyewitness and contemporaneous accounting of Defendant's crimes (State's Ex. 33). Officers discovered

the letter with other paperwork, including a letter from the Social Security Administration to A.T., and prescription medication belonging to A.T., in Defendant's bedroom during execution of a search warrant (Tr. 412, 414, 415). Before Cole testified, she indicated through her attorney outside the presence of the jury her intent to invoke her Fifth Amendment right against self-incrimination (Tr. 378-79). In response and in a hearing held outside the jury's presence, the State granted Cole use immunity for her testimony (Tr. 379). Cole then took the stand and testified that she and Defendant were engaged, that she and Defendant had been in a relationship for five years and had a daughter, and that she lived with Defendant, Defendant's family and A.T. at the house on Fletcher Street (Tr. 379, 385, 386). Cole further testified that she and Defendant lived downstairs in the house, and identified an anniversary card and a letter written by her to Defendant that were discovered during execution of a search warrant (Tr. 386, 387, 388, 412, 414). The trial court admitted both exhibits, ***11** identified as State's Exhibits 36 and 33, into evidence without objection (Tr. 388). In her letter, Cole wrote:
Louis

I don't understand why you never want to spend time with me. Knowing that Sunday is are [sic] anniversary I thought that since we never have any money and we never can go out and do anything, that we could spend the weekend together... . Having alone time, just you know enjoying each other. But I literally have to beg you to just want to sit in the same room as me. You would rather keep treating and old woman like shit, then do something with your own fiance of going on 3 yrs. This is all a bunch of bullshit. See as of right now your still fucking with her. You never stop this is an everyday thing.

You've already ruined everything she has, and now your gonna ruin her coat, that's so fucked up. Everyday Louis, and the only reason you keep her around and keep **abusing** her is for her money. I mean damn, you have a 65yr old woman sleep on the floor with no blanket no nothing, and the only things she has to keep her warm you tear up and throw away. You and your brothers really are gonna cause her to die.

You promised me you would stop but you've gotten 10 times worse.

(State's Ex. 33).

Cole refused to read the letter for the State at trial, and subsequently refused to answer any more questions from the prosecution (Tr. 388-89). The trial court found Cole in contempt and imposed a sanction of 180 days in jail (Tr. 390). After Defendant's counsel moved to strike Cole's testimony and the exhibits and argued that he had no ability to cross-examine Cole because she made herself unavailable to testify, the trial court brought Cole back into the courtroom and indicated that defense counsel "[could] ask her questions about what she did testify to here and then uh if she refuses, she refuses" (Tr. 392). In the presence of the jury, defense counsel proceeded as follows:
Q: State your name, please.

A: Stephanie Cole.

Q: And you previously were here to testify and you understand you're still under oath. Is that correct?

***12** A: Yes.

Q: And, at some point in your testimony you refused to answer any further questions from the State of Indiana, correct?

A: Yes.

Q: If I ask you questions, are you going to refuse to answer my questions, also?

A: No.

Court: Counsel approach. (Bench discussion).

[Defense counsel]: Could we approach, sir?

Court: Mmmm hmmm (affirmative response). (Bench discussion, including [Cole's attorney]).

Q: *I have no questions* but I would have an objection outside the presence of the jury to make record, Your Honor

(Tr. 393) (emphasis added).

First, Defendant's argument fails because Cole's letter is not testimonial in nature. The Confrontation Clause applies only to testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.E.2d 224 (2006). The United States Supreme Court has determined that a statement violates the Confrontation Clause if, among other things, it is "testimonial" in nature. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). While Crawford refrained from defining what evidence is "testimonial," it listed three "formulations of this core class of 'testimonial' statements":
(1).*ex parte* in-court testimony or its functional equivalent - that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

***13** (2) extrajudicial statements... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;

(3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Pendergrass v. State, 913 N.E.2d 703, 706 (Ind. 2009) (citing *Crawford*, 541 U.S. at 51-52, 124 S.Ct. 1354 (numbers added).

Cole's letter is informal and the statements contained within were clearly not intended by her to be used in a criminal prosecution; therefore, the letter is not testimonial. "To determine whether a statement is testimonial, we must decide whether it has 'a primary purpose of creating an out-of-court substitute for trial testimony."' *Turner*, 953 N.E.2dat 1054 -1055 (citing *Michigan v. Bryant*, 562 U.S.,---,131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011). Further, the informality *vel non* of an out-of-court statement aids in this determination. "Although 'formality is not the sole touchstone of our primary purpose inquiry,' a statement's formality or informality can shed light on whether a particular statement has a primary purpose of use at trial." *Id.* (citing *Bullcoming v. New Mexico*, 564 U.S. ---,131 S.Ct. 2705, 2721, 180 L.Ed.2d 610 (2011) (Sotomayor, J., concurring) (quoting *Bryant*, 131 S.Ct. at 1160).

The State did not present the contents of Cole's letter by way of affidavit, deposition or some other formal writing suggesting that her letter was prepared for use at trial. According to Cole's testimony, she wrote the letter to Defendant but not while they lived in the Fletcher Street home where police rescued A.T. (Tr. 387). The letter itself reveals that Cole wrote it because she was upset by Defendant's refusal to spend time with her on their anniversary (State's Ex. 33). Cole's letter to Defendant is extremely informal, and nothing suggests that Cole expected the letter to be used at trial (State's Ex. 33). As our Supreme Court noted in Turner, "When the 'primary purpose' of a statement is 'not to create a record for trial... . admissibility of [the] ***14** statement is the concern of state and federal rules of evidence, not the Confrontation Clause"' *Id.* at 1055. [8] Because Cole's letter is not testimonial, the trial court committed no error by admitting the exhibit into evidence.

Further, Defendant cannot show any prejudice because he had the opportunity to cross-examine Cole but chose not to. After the trial court found Cole in contempt, the court allowed defense counsel to cross-examine Cole about "what she did testify to here and then if she... refuses, she refuses" (Tr. 392). Although Cole became unavailable to the State when she refused to testify at trial, despite the trial court's order to do so and being held in contempt, Cole indicated affirmatively that she would answer questions from the defense during her cross-examination (Tr. 390, 393); *See* Ind. Evidence Rule 804(a)(2) (a witness is unavailable where the witness "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so"); *and Allen v. State*, 813 N.E.2d 349, 362 (Ind. Ct. App. 2004).

Defendant cannot create a *Crawford* violation by his own failure to cross-examine the witness. Defendant's counsel had the opportunity to cross-examine Cole at trial, but refused to do so (Tr. 393).[9] Indeed, even the trial court noted that "[defense counsel] wanted to make uh some record on his objection uh to the uh, his uh inability or uh should I say, *lack of cross examination* of Ms. Cole" (Tr. 395) (emphasis added).

***15** In *Howard v. State*, 853 N.E.2d 461, 470 (Ind. 2006), our Supreme Court found it fundamental that "Crawford speaks only in terms of the 'opportunity' for adequate cross-examination."
The right of confrontation under the Sixth Amendment is honored where 'the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.'

Id. (citations omitted). Opportunity is thus the fundamental inquiry. *See Morgan v. State*, 903 N.E.2d 1010, 1017 (Ind. Ct. App. 2009), trans. denied (discussing the Howard opinion and finding the defendant's confrontation rights not violated by the admission of the discovery deposition because he had an opportunity to examine the witness). Defendant's counsel had adequate opportunity to cross-examine Cole on her memory, perception and truthfulness with respect to writing the letter. "Whether, how, and to what extent the opportunity for cross-examination is used is within the control of the defendant." *Howard*, 853 N.E.2d at 470. Because Defendant had the opportunity to cross- examine Cole, his confrontation rights were not violated. The trial court did not **abuse** its discretion by admitting Cole's letter into evidence.

In any event, the admission of Cole's letter was, at most, harmless error. "[A] denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a [finder of fact] could not have found otherwise." *Jackson v. State*, 735 N.E.2d at 1146, 1152 (Ind. 2000). The evidence in this case certainly meets this standard. A.T. testified that Defendant confined her in a locked utility closet, beat her daily, provided her with very little food and limited access to bathroom facilities, and stole her social security benefits (Tr. 172, 173, 175-76, 185, 186, 192). Indeed, A.T. testified that Defendant ***16** subjected her to horrific living conditions during her confinement by forcing her to urinate and defecate into a plastic bag, dousing her and the mattress she slept on with water, and forcing A.T. to remain confined in a dark room (Tr. 186, 187, 188). A.T. also testified that she never received any of her prescription medications or social security benefits while confined in the house on Fletcher (Tr. 198-99, 199-200). A.T.'s testimony remained unshaken on cross-examination and was corroborated by the officers who rescued her. Officer Tevis testified that he found A.T. locked in a darkened utility closet, furnished with only a mattress (Tr. 41, 42, 47) Tevis described the room's temperature as hot, "almost like a sauna," and remembered that it smelled strongly of human feces and urine (Tr. 42, 49). Tevis testified that he observed a plastic bag hanging on the inside of the door that contained urine and feces (Tr. 42). Officer Spearman recovered A.T.'s prescription medication from Defendant, and two other bottles of prescription medication belonging to A.T. were recovered from Defendant's bedroom during execution of a search warrant (Tr. 98, 101; 412, 414, 416).

Defendant's neighbor, Barbara Shannon, testified that she saw Defendant grab A.T.'s arm and force her to the ground, and heard Defendant deny A.T.'s requests for food and drink (Tr. 303, 306). Shannon testified that when she spoke with Defendant about taking A.T. to her apartment, Defendant told her that A.T. was not leaving "the fucking house" (Tr. 306). Shannon testified that she observed Defendant with a great deal of cash, "stacks of hundreds," that he flashed to her, and he had "[a]lot of prescription medication" (Tr. 308). When Shannon noticed a locked door inside Defendant's house, she contacted Adult Protective Services

(Tr. 312-13). V.A.'s testimony also corroborates the injuries inflicted on A.T. by Defendant, and he described Defendant as "the boss of the house" and that "whatever [Defendant] says goes" (Tr. 352-53, 365). Dr. Parker, the hospital doctor who examined A.T., testified that she suffered from ***17** multiple rib and facial fractures, significant bruising to her extremities, malnutrition, dehydration, delirium, and hypokalemia, a condition that resulted from extremely low levels of potassium and posed an immediate risk of death (Tr. 255, 261, 262, 264, 265, 266, 270, 271). All of this evidence supports Defendant's convictions, and, if the trial court erred by admitting Cole's letter into evidence, the error was harmless. This Court should affirm the trial court's judgment.

II. The trial court did not abuse its discretion in finding facts relevant to sentencing

The trial court did not **abuse** its discretion in finding facts relevant to sentencing. Sentencing decisions rest within the sound discretion of the trial court and are reviewed only for **abuse** of discretion. *Amalfitano v. State*, 956 N.E.2d 208, 211 (Ind. App. 2011). To provide for meaningful appellate review, trial courts are required to enter reasonably detailed sentencing statements when imposing a sentence for a felony. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007). A trial court may **abuse** its discretion by failing to enter a sentencing statement; entering a statement that explains reasons for imposing a sentence but those reasons are not supported in the record; entering a statement that omits reasons clearly supported by the record that were advanced for consideration; or, entering a statement that includes reasons that are improper as a matter of law. *Id.* at 490-91. If a sentencing order lists aggravating and mitigating circumstances, the order must identify all such circumstances and explain why each has been determined to be aggravating or mitigating. *Id.* at 490. Because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now be said to have **abused** its discretion in failing to properly weigh such factors. *Id.* at 491.

***18** At sentencing, the trial court identified several aggravating factors, including: (1) Defendant's crimes occurred over a lengthy period of time; (2) Defendant's criminal history; (3) the victim was over the age of sixty-five; (4) Defendant committed his crimes with assistance from family members who were under his direction and control; and (5) Defendant lacked remorse for his crimes (Tr. 644-45). The trial court found no mitigating circumstances (Tr. 645; App. 199). Finding that the aggravators outweighed the mitigators, the court imposed consecutive sentences and the maximum sentence for each crime, for an aggregate sentence of forty-six executed years (Tr. 646).

Defendant's contention that the trial court **abused** its discretion because he received a different sentence than Amalfitano received is without merit (Appellant's Br. 19-20). Defendant concedes that "no authority requires co-participants to receive proportional sentences." *Lopez v. State*, 527 N.E.2d 1119, 1133 (Ind. 1988). Yet, he argues that he should have received the same sentence that his father received because Defendant's conduct was "nearly identical" to his father's conduct (Appellant's Br. 19-20). First, Defendant ignores an important distinction between the two cases, which is that Amalfitano received a benefit from the State by pleading guilty. *See Amalfitano*, 956 N.E.2d at 210-11 . Amalfitano received the "maximum sentence allowed under the plea agreement - forty-six years, with thirty-four years executed in the Indiana Department of Correction and twelve years suspended to probation." Id. In contrast, Defendant did not plead guilty, and took his chances with a jury instead, which he was certainly entitled to do. But, the evidence at trial showed that Defendant instigated the torture of sixty-five year old A.T., and his own brother testified that he was the mastermind and ring-leader of the horrific crimes perpetrated against a helpless and **elderly** woman (Tr. 351, 352-53, 354, 365, 366, 369). V.A., who had first-hand knowledge of Defendant's **abusive** treatment of A.T., testified that ***19** Defendant ran the show and "was the boss of the house" and that "whatever he says goes" (Tr. 366). At sentencing, A.T. also identified Defendant as the most culpable member of the Amalfitano family, the one who repeatedly and continuously victimized her (Tr. 612). The trial court did not **abuse** its discretion by imposing a different sentence for Defendant than Amalfitano.

Defendant's only other claim - that the trial court improperly relied upon his criminal history - is equally baseless (Appellant's Br. 20). Defendant is correct that most of his history is juvenile, and the trial court should have referred to his history as juvenile, not criminal (Appellant's Br. 20). Defendant's juvenile history was relevant because of his age - twenty-one years old - at sentencing (Presentence Investigation Report "PSI" p. 1). Indeed, Defendant acknowledges several juvenile adjudications for

battery and concedes that "criminal behavior reflected in delinquent adjudications can serve as the basis for enhancing an adult criminal sentence" (Appellant's Br. 20, *citing Ryle v. State*, 842 N.E.2d 320, 321 (Ind. 2005)). Defendant's juvenile history from Florida reveals two adjudications for battery in 2005, as well as an adjudication for resisting law enforcement ("PSI" p. 3-4). In 2006, Defendant received a deferral for battery and contempt of court, and his PSI shows a "disposition unknown" for misdemeanor charges of fraud, giving a false name after being arrested; and fraud/swindle, fraudulently obtaining goods or services, defrauding a healthcare provider (PSI p. 4). In 2007, Defendant was adjudicated delinquent for fraud/false ID and fraud/defrauding a healthcare provider (PSI p. 4). In sum, Defendant's juvenile history reflects several arrests for battery or domestic battery, and at least three adjudications, including battery, resisting law enforcement and fraud (PSI p. 3, 4, 5). Defendant's juvenile history bears directly on all the crimes he was convicted of here, which include both violent crimes and crimes involving theft, fraud and ***20** **financial** exploitation. The trial court did not **abuse** its discretion by considering Defendant's juvenile history as an aggravating factor. This Court should affirm the trial court's judgment.

In sum, the trial court did not **abuse** its discretion in finding facts relevant to sentencing. The trial court committed no error when it imposed a longer sentence for Defendant's crimes than for his father's crimes. Unlike Defendant, Amalfitano pled guilty and received some benefit by way of a plea agreement. Further, while Defendant contends that his crimes were "nearly identical," the record shows that Defendant instigated the crimes against A.T., and that other family members operated under his control and direction. The trial court also did not improperly rely upon Defendant's juvenile history as an aggravating factor. Defendant's juvenile history reveals several arrests and at least three adjudications for battery, resisting law enforcement and fraud, which bear directly on his present convictions for violent and fraudulent offenses. This Court should affirm the trial court's judgment.

III. Defendant's sentence is not inappropriate given the nature of his offenses and character

Defendant's sentence is not inappropriate given the nature of his offenses and character. A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. App. Rule 7(B). This Court gives due consideration to the trial court's sentencing decision. Ind. App. Rule 7(B); *Akard v. State*, 937 N.E.2d 811, 813 (Ind. 2010). In making this determination, this Court may look to any factors appearing in the record. *Calvert v. State*, 930 N.E.2d 633, 643 (Ind. Ct. App. 2010). The Defendant bears the burden to "persuade the appellate court that his or her sentence has met this inappropriateness standard of review." *Id.* Whether a sentence is inappropriate ultimately turns on the culpability of the defendant, the severity of the crime, the damage done to others, ***21** and a myriad of other factors that come to light in a given case. *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind.2008). "[T]he question under Appellate Rule 7(B) is not whether another sentence is *more* appropriate; rather, the question is whether the sentence imposed is inappropriate." *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App.2008) (emphasis in original). Here, Defendant has failed to establish that his sentence is inappropriate given the nature of the offense and his character.

First, Defendant fails to argue that the nature of his offenses justifies a reduced sentence and has therefore waived review of his sentence for inappropriateness. *Perry v. State*, 921 N.E.2d 525, 527 (Ind. Ct. App. 2010). "[A] revision of a sentence under Indiana Appellate Rule 7(B) requires the appellant to demonstrate that his sentence is inappropriate in light of both the nature of his [or her] offenses and his [or her] character." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). Defendant centers his argument solely on his character, and makes no attempt to argue that the nature of his offenses warrants a lesser sentence, and has therefore waived review of his sentence under Rule 7(B). See Appellant's Br., 21-22.

Waiver aside, the nature of Defendant's offenses fully supports his forty-six year executed sentence. As the trial court aptly noted:

[I]t is clear from the trial testimony that you were the ring leader, not your father, not Stephanie and neither your brother. You were. We saw the photos. [A.T.] was kept hostage in [sic] a urine soaked mattress to sleep on, feces hanging on a doorknob on a super market bag, heat in the room over a hundred degrees, no windows. There is no sense being polite about it. It quite frankly was just torture. She was tortured and you're responsible

Animals don't treat other animals like that. That's how disgusting and really that's the only word I can come up with, that's how disgusting this case is. The Court of Appeals says that we should reserve the maximum sentence for the worst of the worst. The facts of this case, I can't come to any other conclusion. How you can lock a sixty five plus year old woman in a room, force her to sleep on a ***22** mattress like that, defecate in a bag for that period of time. To listen to the doctor testify about how she was close to death when they found her

(Tr. 642, 645). Defendant kept sixty-five year old A.T. locked in a utility closet, barely alive, so that he could steal her monthly social security benefits and prescription medication. Defendant supplied A.T. with little food, forced her to urinate and defecate in a plastic bag and subjected her to inhumane living conditions (Tr. Tr. 172, 173, 175-76, 185, 186, 192). During this time, Defendant beat A.T. daily and she sustained multiple rib fractures, facial fractures, and extensive bruising to her face and extremities (Tr. 180, 184, 196, 197, 198, 270, 271, 272, 273, 276; State's Ex.19-31). Dr. Parker described A.T.'s near-death condition, noting extreme weight loss, malnutrition, dehydration, delirium and hypokalemia, a condition that posed an immediate risk of death (Tr. 261, 262, 264, 266). The nature of his offenses demands nothing less than his forty-six year executed sentence.

As for Defendant's character, his juvenile history is significant because of his age and includes several adjudications for battery and at least one adjudication for fraud, which bears directly on all of the crimes that he was convicted of here, which include both violent crimes and crimes involving theft, **financial** exploitation and fraud. The fact that Defendant beat a helpless sixty-five year old woman on a daily basis, kept her locked in a utility closet for months without adequate food or even access to bathroom facilities, and forced her to sleep on a urine-soaked mattress, all so that he could steal her social security checks and prescription drugs, is reprehensible and shows deplorable character. Defendant's crimes were egregious, and warrant nothing less than the maximum sentence.

Defendant's suggestion that his character warrants a sentence reduction because his minister testified that he showed loyalty to his family and because he "developed an awareness of the extent of his of his substance **abuse** problem" is seriously misguided (Appellant's Br. 21). ***23** First, Defendant did not meet Reverend Kirkland until after his arrest for the horrific crimes he perpetrated against A.T. (Tr. 628, 629, 630). Kirkland testified about her perception of Defendant's "countenance" (Tr. 630-31). Contrary to his assertion, Kirkland did not testify that Defendant was remorseful; she testified that Defendant is "someone who can be remorseful" (Tr. 627). Kirkland testified to the effect that Defendant showed loyalty to his family by seeing his children once and supporting them by stealing money from A.T. (Tr. 629, 631). The trial court did not **abuse** its discretion when it gave her opinions no mitigating weight.

Further, the fact that Defendant began drug treatment after his arrest does not justify a lesser sentence. Despite the fact he stole prescription drugs from A.T. and kept her hostage in a locked room for many months, Defendant maintained at sentencing that "I figured out I had a drug problem when I came off the drugs in the jail" (Tr. 636). After listening to testify about his difficult childhood and exposure to drugs, the trial court rightly determined that Defendant lacked remorse and noted:

> [Y]ou're trying to place blame on your father and I'm not buying it cause the evidence wasn't that. It was you. Your own brother looked at you and said that you were the one. He was credible because he didn't want to be here, didn't want to testify against you but yet he did the right thing and under oath said you were the one. [A.T.] said you were the one. Yes, many people are born and some people just don't have it fair. It's not fair. They start off with the deck stacked against them. And that may have been the case for you but at a certain point, people are responsible for the choices they make and you don't get to look at anybody but yourself for what you did to [A.T.]

(Tr. 644-45).

In sum, Defendant has failed to meet his burden of establishing that both the nature of his offenses and his character justify a lesser sentence. Defendant has waived this issue by failing to argue that the nature of his offenses warrants a downward revision in his sentence. Defendant ***24** sentence is not inappropriate, especially in light of his culpability, the severity of his crimes, and his lack of remorse. This Court should affirm the trial court's judgment.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the trial court's judgment be affirmed.

Footnotes

1 Ind. Code § 35-42-3-3(a)(a)(b)(2)(B)

2 Ind. Code § 35-42-2-1(a)(3)

3 Ind. Code § 35-46-1-12(a)(1)(b)(2)

4 Ind. Code § 35-46-1-12(c)(d)(2)

5 Ind. Code § 35-43-4-2(a)

6 Ind. Code § 35-48-4-14(c)

7 Ind. Code § 35-48-4-7

8 Defendant does not assert that the trial court's admission of Cole's letter violated Indiana's rule against hearsay.

9 Defendant also asserts that Cole's deposition did not provide a prior opportunity for cross-examination because his counsel was unprepared for the deposition and the trial court did not permit the deposition to be admitted into evidence (Appellant's Br. 14; Tr. 402). A review of Cole's deposition reveals that Defendant's counsel asked no questions of Cole on cross-examination (State's Ex. 40).

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